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No. 07-711

In The Supreme Court of the United States

IN RE KATRINA CANAL BREACHES LITIGATION
XAVIER UNIVERSITY OF LOUISIANA,

Petitioner,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fifth Circuit abuse its discretion in concluding that "the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal," and therefore denying Petitioner's motion to certify a question of insurance policy interpretation to the state supreme court?

CORPORATE DISCLOSURE STATEMENT

Respondent Travelers Property Casualty Company of America is an indirect wholly-owned subsidiary of The Travelers Companies, Inc.

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BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner asks this Court to review the Fifth Circuit's decision not to certify a question of insurance policy interpretation to a state supreme court. There is no reason, let alone a compelling reason, to grant certiorari. There is no circuit split. No federal constitutional provision or federal statute is involved. Petitioner invokes only this Court's supervisory power, asking the Court to review a highly discretionary decision by a court of appeals. The Fifth Circuit acted well within its considerable discretion in determining that well-established principles of contract interpretation in the Louisiana Civil Code provided sufficient guidance for the Fifth Circuit to decide a straightforward question of insurance policy construction. Given that Petitioner chose to file this suit in federal court under diversity jurisdiction, it can hardly complain about the fact that a federal court of appeals decided a state law issue rather than certifying it. The petition for certiorari should therefore be denied.

STATEMENT OF THE CASE

Petitioner Xavier University of Louisiana is a large university located in the City of New Orleans. It purchased commercial property insurance coverage from Respondent Travelers Property Casualty Company of America, which was in effect when Hurricane Katrina struck on August 29, 2005. Petitioner's

buildings sustained some damage resulting from Hurricane Katrina's winds. During the hurricane, levees broke on several canals in New Orleans, resulting in large-scale flooding. Some of Petitioner's buildings were damaged by the floodwaters.

The insurance policy issued by Respondent covered loss caused by wind, but expressly excluded loss caused by "flood." Petitioner also purchased a separate flood insurance policy through the National Flood Insurance Program, but the limits were inadequate to cover the flood damage to Petitioner's buildings. Seeking to recover for both wind and flood damage, Petitioner filed this breach of contract suit against Respondent in the U.S. District Court for the Eastern District of Louisiana, which had jurisdiction based on diversity of citizenship.

In the district court, Petitioner filed a motion for partial summary judgment, seeking a ruling that the insurance policy covered the damage to its buildings caused by the massive inundation of New Orleans, notwithstanding the "flood" exclusion. As Petitioner put it, it was seeking coverage for "damages to Xavier's campus following Hurricane Katrina [that] were caused by ground water which came from the collapses of the 17th Street Canal and the London Avenue canal levees. . . ." Petitioner argued that the term "flood" should be interpreted as referring to a "natural" event, and that the levee breaches were caused by "non-natural" causes — human acts or omissions in the design, construction or maintenance of the levees.

Petitioner's motion for partial summary judgment was heard together with dispositive motions in other cases raising essentially the same issue.[1] The district court granted Petitioner's motion for partial summary judgment in part, holding that the term "flood" was ambiguous and should be construed as referring to "natural" events. *In re Katrina Canal Breaches Consol. Litig.*, 466 F. Supp. 2d 729, 766-67 (E.D. La. 2006), *vacated and remanded*, 495 F.3d 191 (5th Cir. 2007). The district court concluded, however, that there were genuine issues of fact in dispute with respect to the cause of the levee breaches. *Id.* at 767. The district court *sua sponte* certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Id.* at 780-81. Respondent filed a petition for permission to appeal in the Fifth Circuit, which granted review.

While the case was pending in the Fifth Circuit, Petitioner and other plaintiffs moved to certify the question presented to the Louisiana Supreme Court. These motions were carried with the case to be ruled upon by the merits panel. When it issued its decision on the merits, the Fifth Circuit denied the motions to certify, concluding that "[b]ecause the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this

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[1] There is another petition for certiorari pending in this Court in one of the cases that was heard together with the instant case in both the district court and the court of appeals. *See Chehardy v. Allstate Indem. Co.*, No. 07-713.

appeal, we decline the certification requests." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 208 n.11 (5th Cir. 2007).

The Fifth Circuit concluded, unanimously, that what occurred in New Orleans was clearly a "flood":

> [W]e conclude that the flood exclusions in the plaintiffs' policies are unambiguous in the context of the facts of this case. In the midst of a hurricane, three canals running through the City of New Orleans overflowed their normal boundaries. The flood-control measures, i.e., levees, that man had put in place to prevent the canals' floodwaters from reaching the city failed. The result was an enormous and devastating inundation of water into the city, damaging the plaintiffs' property. This event was a "flood" within that term's generally prevailing meaning as used in common parlance, and our interpretation of the exclusions ends there. The flood is unambiguously excluded from coverage under the plaintiffs' all-risk policies, and the district court's conclusion to the contrary was erroneous.

Id. at 196. In reaching this result, the Fifth Circuit applied the principles of contract interpretation set forth in the Louisiana Civil Code. The Code provides that "[t]he words of a contract must be given their generally prevailing meaning," and that "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. Civ.

Code arts. 2046, 2047.[2] The Fifth Circuit applied the Code the same way the Louisiana Supreme Court does. The state supreme court has held that the "generally prevailing meaning" of a word is the meaning used in "common parlance" by "a reasonable person, a person in the street or an average citizen. . . . " *Schroeder v. Bd. of Supervisors of La. State Univ.*, 591 So. 2d 342, 346 (La. 1991). *See also Savoie v. Fireman's Fund Ins. Co.*, 347 So. 2d 188, 191 (La. 1977). As the Fifth Circuit held, there is no doubt that in common parlance what occurred in New Orleans was a "flood." *Katrina Canal Breaches*, 495 F.3d at 196.

Petitioner filed a petition for rehearing *en banc*, arguing, *inter alia*, that the panel erred in declining to certify the question presented to the state supreme court. Petitioner asked the *en banc* court to certify the question. Petitioner also moved to stay the mandate on the grounds that, in *Sher v. Lafayette Ins. Co.*, the Louisiana Fourth Circuit Court of Appeal was scheduled to hear oral argument on the applicability of a "flood" exclusion in a Hurricane Katrina case.

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[2] Louisiana is a unique civil law jurisdiction in which "the only authoritative 'sources of law are legislation and custom,'" and "courts must look first and foremost to the state's 'primary sources of law: the State's Constitution, codes, and statutes.'" *Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003). *See also In re Whitaker Constr. Co.*, 439 F.3d 212, 222 (5th Cir. 2006) ("In the civil law tradition, the Civil Code is the 'solemn expression of legislative will' to which our *Erie* obligation applies.").

Petitioner asked that the mandate be stayed until both the Louisiana Fourth Circuit and the Louisiana Supreme Court had issued decisions in *Sher*. The Fifth Circuit denied the petition for rehearing *en banc*, denied the motion to stay the mandate, and issued its mandate.

Following issuance of the mandate, discovery has continued in the district court. Petitioner filed several motions for partial summary judgment on other issues that it claims are closely tied to the interpretation of the "flood" exclusion. While those motions were pending, the Louisiana Fourth Circuit issued a decision in *Sher*. As explained in further detail herein, the *Sher* court did not issue a majority opinion on the "flood" exclusion. It voted 2-2 on whether the term "flood" was ambiguous, with one judge ruling that the term "flood" was unambiguous, but that the damage at issue was covered because it was caused by wind, and one judge concurring in the result without explaining her views. *Sher v. Lafayette Ins. Co.*, 2007 WL 4247708 (La. Ct. App. Nov. 19, 2007). After the *Sher* opinion came down, the district court denied Petitioner's motions for partial summary judgment, without prejudice to the motions being reurged after the Louisiana Supreme Court denies writs or issues a decision on the merits in *Sher*.

SUMMARY OF ARGUMENT

The only issue decided by the Fifth Circuit was a question of contract interpretation under Louisiana law. Petitioner does not ask this Court to review the issue decided by the Fifth Circuit because it knows that this Court does not, except in extraordinary circumstances, review decisions by the lower federal courts on issues of state law. In an effort to manufacture a "federal" issue, Petitioner argues that the Fifth Circuit erred in failing to certify a question of state law to the state supreme court. But that is a highly discretionary decision, dependent on a careful analysis of the state law issue on which certification is being sought. Petitioner fails to show that the Fifth Circuit committed any error, let alone such an egregious abuse of discretion as to warrant the exercise of this Court's supervisory powers.

This Court gives the courts of appeals considerable deference in deciding questions of state law, and, as part of that process, deciding whether to certify a question to a state supreme court. In making that decision, the Fifth Circuit and other courts of appeals consider all relevant factors, most importantly whether the applicable principles of state law are sufficiently clear. Petitioner does not challenge the criteria applied by the Fifth Circuit in exercising its discretion. While Petitioner attempts to suggest that there is a circuit split on the certification of questions to state supreme courts, there clearly is none.

In order to decide whether the Fifth Circuit abused its discretion, this Court would have to immerse itself in Louisiana contract law and its unique civilian tradition. Such an inquiry would, however, readily demonstrate that the Fifth Circuit acted well within its discretion. The question of whether the massive inundation of New Orleans at the time of Hurricane Katrina was a "flood" was governed by well-established, basic principles of contract law set forth in the Louisiana Civil Code and Louisiana Supreme Court decisions.

Petitioner also argues that the Fifth Circuit's decision conflicts with the decision by the Louisiana intermediate appellate court in *Sher*. But there was no majority opinion in *Sher*. The plurality opinion contains little reasoning and ignores the Fifth Circuit's decision. A non-precedential, evenly-divided and sparsely reasoned opinion of one of Louisiana's five circuit courts of appeal is not grounds for this Court to intervene.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT ACTED WELL WITHIN ITS DISCRETION IN DENYING PETITIONER'S MOTION TO CERTIFY QUESTIONS TO THE STATE SUPREME COURT

Certification of a question to a state supreme court is not governed by any federal statute or rule of procedure. Instead, it is a procedure that is made

available to the federal courts by some state courts of last resort, and is exercised by the federal courts in their discretion. This Court has long recognized that certification to a state supreme court is never "obligatory," and "in a given case rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). When a federal court decides to certify, the decision to answer a certified question, or decline to do so, rests entirely in the discretion of the state court. State statutes and rules of court vary considerably with respect to whether certification is permitted, the criteria for considering certification, and which federal courts can certify a question. It is a procedure that is highly discretionary in both the federal and state courts.

A court of appeals' decision on certification is inherently intertwined with its evaluation of the merits of the state law issue on which certification is sought. "[T]he use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of [this Court's] federal-state jurisprudence." *Id.* at 394 (Rehnquist, J., concurring). A decision on certification necessarily depends, in part, on how well-established the applicable principles of state law are, and the extent to which state appellate courts (or courts in other jurisdictions that may be looked to for guidance) have disagreed on the question presented. As then-Justice Rehnquist noted, "it would be unthinkable to any of the Members of this Court to

prescribe the process by which a district court or a court of appeals should go about researching a point of state law which arises in a diversity case." *Id.* "If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used." *Id.*

As this Court has recognized, certification is not a panacea, and in some instances is clearly improper. "It would be manifestly inappropriate to certify a question in a case where . . . there is no uncertain question of state law whose resolution might affect the pending federal claim." *City of Houston v. Hill*, 482 U.S. 451, 471 (1987). For example, "[a] federal court may not properly ask a state court if it would care in effect to rewrite a statute." *Id.* While this Court has at times suggested that, on remand, it may be appropriate for a court of appeals to certify a question of state law, Petitioner fails to cite a single case in which this Court has ever ordered a court of appeals to use the certification procedure. It does not appear that this Court has ever done so.

The discretion this Court has given the courts of appeals on certification goes hand-in-hand with the considerable deference this Court accords the courts of appeals in deciding the merits of issues of state law. This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is

located." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004). *See also Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals."). The main reason for this is that "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than [the Supreme Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58 (1979).[3] Judges on the Fifth Circuit, for example, are well-versed in Louisiana's unique system of civil law. The members of the Fifth Circuit panel in this case collectively had 46 years of experience on the federal appellate bench, during which they have decided countless questions of Louisiana law.

The Fifth Circuit acted well within its discretion in concluding that "the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal. . . ." *Katrina Canal Breaches*, 495 F.3d at 208 n.11. The Fifth Circuit had no difficulty in applying the

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[3] *See also McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) ("Since the jurisdiction of the [Eleventh Circuit] Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law."); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738 (1989) ("We think the [Fifth Circuit] Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine [the state law issues in the case].").

Louisiana principles of contract law to decide whether the massive inundation of New Orleans was a "flood." Indeed, to the average citizen it seems preposterous that lawyers are even arguing about whether the inundation of New Orleans was a "flood." Petitioner fails to explain why the governing principles of contract law were so uncertain that this Court should exercise its supervisory power to grant certiorari, and then immerse itself in Louisiana contract law to determine whether the Fifth Circuit abused its discretion in denying certification. While the question before the Fifth Circuit was important to policyholders and the insurance industry, there is no requirement that all important questions be certified even if the applicable principles are clear.

Moreover, the Fifth Circuit was entitled to take into account the fact that Petitioner chose to sue in federal district court, knowing that a federal court would decide the issues of state law presented by the case. *See Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1248 (5th Cir. 1997) (noting that courts are "slow to honor a request for certification from a party who chose to invoke federal jurisdiction") (quoting 17A Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE § 4248, at 176 (1988).[4]

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[4] The courts of appeals frequently look with skepticism on a motion to certify by the party that chose to litigate in a federal forum. *See, e.g., Doe v. City of Chicago*, 360 F.3d 667, 672 (7th Cir. 2004) ("[I]t's not a proper alternative to proceeding in the first instance in state court to sue in federal court but ask that

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Petitioner relies on three decisions by this Court which are readily distinguishable. *Elkins v. Moreno*, 435 U.S. 647 (1978); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). In all three cases, there was a state law issue that, depending on how it was decided, might make it unnecessary to decide a question of federal constitutional law. In *Elkins*, this Court certified a question to the Maryland Court of Appeals based on the Court's "longstanding policy of avoiding unnecessary constitutional questions." *Elkins*, 435 U.S. at 661. Similarly, in *Arizonans*, the Court noted in *dicta* (after concluding that the plaintiffs had no standing) that the lower courts could potentially have avoided deciding whether an amendment to the Arizona Constitution was compatible with the U.S. Constitution if the Arizona Supreme Court had been offered the opportunity to construe the state constitutional provision. The Court explained that "[w]arnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks

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the suit be stayed to permit certifying the interpretive issue to the state court, thus asking that the suit be split between two courts."); *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988) (noting that the position of plaintiffs who brought suit in federal court "and when they saw the result, thought better of the state after all . . . could hardly have been made less compelling"); *Cantwell v. University of Mass.*, 551 F.2d 879, 880 (1st Cir. 1977) ("[O]ne who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification.").

friction-generating error if it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans*, 520 U.S. at 79.

In *Town of Castle Rock*, this Court avoided a federal constitutional question when it held that Colorado law did not provide the plaintiff with a right to police enforcement of a restraining order. The Court concluded that certification of that question to the state supreme court was unnecessary. *Town of Castle Rock*, 545 U.S. at 758-66 & n.5. Petitioner relies on the *dissent*, which concluded that the Court should have deferred to the Tenth Circuit's interpretation of Colorado law or, "barring that," should have certified the question to the Colorado Supreme Court. *Id.* at 778 n.6 (Stevens, J., dissenting) ("Both options that I favor — deferring to the Circuit's interpretation or, *barring that*, certifying to the Colorado Supreme Court — recognize the comparative expertise of another tribunal on questions of state law." (emphasis added)).

The federalism concerns that were implicated in *Elkins*, *Arizonans*, and *Town of Castle Rock*, where federal courts were asked to strike down a state statute or state constitutional provision on federal constitutional grounds, are not present when federal courts are interpreting state law in diversity cases. The diversity jurisdiction dockets of the federal courts of appeals would grind to a halt if they were required to certify to a state supreme court questions as straightforward as whether the massive inundation of a major city was a "flood." Litigants who, like

Petitioner, choose to sue in federal court assume the risk that the result they obtain from the federal court of appeals might not be the same result that other litigants obtain in state court.

II. PETITIONER'S ATTEMPT TO MANUFACTURE A CIRCUIT SPLIT IS WITHOUT MERIT

Petitioner tries to create a circuit split by citing instances in which courts of appeals have on occasion certified questions of insurance policy interpretation to state courts of last resort. But Petitioner has failed to show that there is any disagreement among the courts of appeals, let alone a well-developed disagreement that would require intervention by this Court.

In exercising its discretion on certification, the Fifth Circuit takes into consideration all pertinent factors. "The most important [factors] are the closeness of the question and the existence of sufficient sources of state law . . . to allow a principled rather than conjectural conclusion." *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir. 1976). The Fifth Circuit also considers, among other factors, "the practical limitations of the certification process; significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court." *Id. See also* 17A Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4248 (quoting *Shevin*'s description of the factors

that guide certification and noting that "the Fifth Circuit . . . has had by far the greatest experience with certification").

The courts of appeals are in agreement that the decision on certification is a highly discretionary, case-by-case determination, in which the court will consider all pertinent factors. For example, the D.C. Circuit has noted that "[t]he most important consideration guiding the exercise of this discretion . . . is whether the reviewing court finds itself genuinely uncertain about a question of state law that is vital to a correct disposition of the case." *Tidler*, 851 F.2d at 426. Similarly, the Second Circuit has stated that it "will not certify questions of law where sufficient precedents exist for us to make this determination"; rather, "[c]ertification is to be used in those cases 'where there is a split of authority on the issue, where [a] statute's plain language does not indicate the answer, or when presented with a complex question of [state] common law for which no [state] authority can be found.'" *DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005) (citations omitted). The Seventh Circuit considers "several factors . . . the most important of which is whether we feel genuinely uncertain about an issue of state law." *Schmude v. Sheahan*, 420 F.3d 645, 650-51 (7th Cir. 2005).[5]

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[5] Other circuits apply similar factors. *See Fields v. Legacy Health Sys.*, 413 F.3d 943, 958 (9th Cir. 2005); *Local 514 Transport Workers Union of Am. v. Keating*, 358 F.3d 743, 758 (10th Cir. 2004); *Jennings v. BIC Corp.*, 181 F.3d 1250, 1254 n.2 (11th

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Like the Fifth Circuit, other courts of appeals have concluded that where the governing principles of state law are sufficiently clear, there is typically no need for certification. *See, e.g., Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) ("Although Kentucky has not addressed the exact question at issue, it does have well-established principles to govern the interpretation of insurance contracts. Accordingly . . . we [] decline to certify it."); *Woodbridge Place Apartments v. Wash. Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992) (refusing to certify because "Indiana's general principles of contractual construction provide enough guidance").

The cases cited in the Petition fail to demonstrate any disagreement between the courts of appeals on certification, let alone a well-developed one. In *City of Burlington v. Indemnity Ins. Co. of N. Am.*, 332 F.3d 38 (2d Cir. 2003), the Second Circuit certified questions of insurance policy interpretation to the Vermont Supreme Court because it found that, in order to decide those questions, it would have to make "significant assumptions" about basic, fundamental principles of Vermont insurance law. *Id.* at 50. To use the terminology of its sister circuits, the Second

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Cir. 1999); *Travelers Indem. Co. v. DiBartolo*, 171 F.3d 168, 169 n.1 (3d Cir. 1999); *Powell v. U.S. Fid. & Guar. Co.*, 88 F.3d 271, 273-74 (4th Cir. 1996); *Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake*, 771 F.2d 1153, 1157 n.2 (8th Cir. 1987); *Bi-Rite Enters. v. Bruce Miner Co.*, 757 F.2d 440, 443 n.3 (1st Cir. 1985); *Am. Fid. Bank & Trust Co. v. Heimann*, 683 F.2d 999, 1002 (6th Cir. 1982).

Circuit was unable to find "sufficient sources of state law . . . to allow a principled rather than conjectural conclusion" and therefore found itself "genuinely uncertain about a question of state law that is vital to the correct disposition of the case." *Shevin*, 526 F.2d at 275; *Tidler*, 851 F.2d at 426. Here, in contrast, the Fifth Circuit did not need to make any assumptions about Louisiana law in applying the well-established principles of the state's Civil Code.

Petitioner also cites two cases in which the Eleventh Circuit certified questions of insurance policy interpretation to the Georgia Supreme Court. In *York Ins. Co. v. Williams Seafood of Albany, Inc.*, 223 F.3d 1253, 1256 (11th Cir. 2000), the court of appeals found that two policy provisions were in conflict, that there were several reasonable interpretations, and that Georgia appellate caselaw provided insufficient guidance. In *United States Fid. & Guar. Co. v. Park 'n Go of Georgia, Inc.*, 66 F.3d 273, 277-78 (11th Cir. 1995), the court of appeals concluded that there were two seemingly inconsistent lines of Georgia Supreme Court authority on the basic question of when a court can look outside the four corners of a contract to ascertain its meaning. Here, unlike in *Williams Seafood* and *Park 'n Go*, the Fifth Circuit concluded that the applicable rules of contract interpretation in Louisiana were clear and well-established. *Katrina Canal Breaches*, 495 F.3d at 208 n.11. Petitioner does not seriously contend that the applicable principles of Louisiana law were unclear.

There is also no merit to Petitioner's attempt to create an "intra-circuit" split by suggesting that the Fifth Circuit's decisions on certification are inconsistent.[6] In all three cases relied on by Petitioner, there was disagreement between the intermediate appellate courts in Texas on the questions presented. *One Beacon Ins. Co. v. Don's Building Supply, Inc.*, 496 F.3d 361, 364 (5th Cir. 2007); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 428 F.3d 193, 197-98 (5th Cir. 2005); *Fiess v. State Farm Lloyds*, 392 F.3d 802, 809-10 (5th Cir. 2004). Moreover, Texas, unlike Louisiana, is a common-law jurisdiction, which lacks the type of definitive contractual interpretation statutes that Louisiana has enacted in its Civil Code. In Louisiana, legislation is the primary source of law and judicial decisions are never binding until there is a series of decisions that rise to the level of *jurisprudence constante*. *See Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 377 F.3d 459, 462 (5th Cir. 2004) ("[A]lthough we may be guided by decisions rendered by the Louisiana appellate courts, we are not strictly bound by them, particularly when the jurisprudence has not developed to the status of jurisprudence constante (a series of decisions in accord on a given issue)."); *Lake Charles Diesel, Inc. v. GMC*, 328 F.3d 192, 197 (5th Cir. 2003) (noting that, in Louisiana, "judicial decisions acquire the force of law only when

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[6] If there were inconsistency in the Fifth Circuit's decisions, that might lead to *en banc* review, but would not warrant a grant of certiorari.

their numerosity and uniformity are sufficient to achieve the status of jurisprudence constante").

The Fifth Circuit's denial of the Petitioner's motion to certify was consistent with this Court's decisions and the standards for certification throughout the courts of appeals. The Fifth Circuit's decision to decline certification was also a permissible exercise of that court's considerable discretion. There is thus no reason, let alone a compelling one, to grant certiorari.

III. THE LOUISIANA COURT OF APPEAL DECISION IN *SHER* IS NOT GROUNDS FOR GRANTING CERTIORARI

The Petition also contends that the Fifth Circuit's decision conflicts with *Sher*, a Hurricane Katrina case in which the Louisiana Fourth Circuit affirmed a jury verdict requiring an insurer to pay for damage to the basement of the insured building, which the insurer contended was caused by flood. The five-member panel, however, could not reach a majority on the rationale for this result. The vote on the "flood" exclusion was 2-2 with one abstention. A two-judge plurality concluded, without much explanation, that the term "flood" was ambiguous. *Sher*, 2007 WL 4247708, at *4-5 (Love, J., joined by McKay, J.). One judge concluded that "it is clear that the word 'flood' applied to any and all floods," but then found, based largely on "judicial notice," that the damage to the basement was caused by wind, not flood, and

therefore was covered by the policy. *Id.* at *20-21 (Tobias, J., concurring in the result). One judge dissented from the portion of the opinion requiring the insurer to pay for the damage to the basement. He concluded that "the term 'flood,' as well as the entirety of the exclusion, is clear and unambiguous." *Id.* at *23 (Cannizzaro, J., concurring in part and dissenting in part). The fifth member of the court, Judge Murray, cryptically concurred only in the result, declining to explain her reasons or join any of her colleagues' opinions. *Id.* at *20 ("Murray, J., concurs in the result."). Judge Murray offered no indication of her view on the flood exclusion, leaving the court evenly split on that issue. Consequently, *Sher* only stands for a result — that the plaintiff, for whatever reason, is entitled to insurance coverage for water damage to his basement.

Because there was no majority opinion on the water damage exclusion in *Sher*, the decision has little precedential value. *Citizens Comm. for Better Law Enforcement v. Lafayette*, 685 So. 2d 289, 293 (La. Ct. App. 1996) (explaining that a plurality opinion "is of little value as precedent and should properly be limited to the facts of that case only"); *see also Chaney v. Travelers Ins. Co.*, 249 So. 2d 181, 184 (La. 1971) (explaining that there was no majority on a seven-member court where one justice concurred in the result and three justices dissented). This is especially true in Louisiana, where judicial decisions are never binding until they rise to the level

of *jurisprudence constante*. *See Chevron USA*, 377 F.3d at 462; *Lake Charles Diesel*, 328 F.3d at 197.

Petitioner does not even argue that the Fifth Circuit would reach a different result based on the non-precedential decision in *Sher*. The plurality opinion is unpersuasive, and fails to even acknowledge the Fifth Circuit's thorough opinion. The plurality reasoned as follows:

> A review of the Policy reveals that the parties intended to cover and include all risks that were not specifically excluded or limited. Lafayette failed to specifically exclude all floods because of the ambiguity contained within the water exclusion. While the Policy states that it does not cover damage caused by a "flood," it also states that it does not cover "waves, tides, tidal waves," and the "overflow of any body of water . . . whether driven by wind or not." This exclusion includes "flood," but then continues to list specific natural disasters that cause inundations of water, commonly labeled as "floods." For example, a varying cause of a flood can be man-made or natural, as documented in La. R.S. 29:762, which states that a flood is a natural disaster.

Sher, 2007 WL 4247708, at *4.

This reasoning was persuasively rejected by two other judges on the *Sher* panel. As Judge Cannizzaro explained, the words "surface water, waves," etc. are "not intended in any way to be a definition of the

word 'flood,'" or otherwise restrict the meaning of "flood." *Id.* at *24 (Cannizzaro, J.). As Judge Tobias explained, "[t]he greater includes the lesser" and "[i]n context, it is clear that 'flood' includes flood from any source whatsoever, including surface water, waves, et cetera." *Id.* at *20 (Tobias, J.). To the extent that the plurality relied on the fact that the word "flood" was included in a list of "natural disasters" in a Louisiana homeland security statute, the plurality was grasping at straws. *See id.* at *26 (Cannizzaro, J.) (noting that the homeland security statute "provides no guidance to the use of the word 'flood' relative to the case at hand and, particularly, to the policy issued by the defendant (i.e., contract between the parties)."). Given the lack of persuasiveness of the plurality opinion, *Sher* can hardly be expected to persuade the Fifth Circuit that its lengthy and careful opinion was an incorrect prediction of how the Louisiana Supreme Court would rule. *See Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 249 (1998).

Sher in no way warrants an order granting the Petition, vacating the decision below, and remanding. This procedure, known as GVR, is "potentially appropriate" when "intervening developments, or recent developments that [this Court has] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation. . . ."

Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam). While this Court has on occasion issued a GVR order where there is an intervening state supreme court decision that is squarely contrary to the decision of a federal court of appeals, *see, e.g., Thomas v. American Home Prods., Inc.*, 519 U.S. 913 (1996), it does not appear that this Court has ever issued a GVR order based on an intervening decision by a state intermediate appellate court, or based on the possibility that a state supreme court might decide the question. Even if an intermediate appellate decision could be grounds for a GVR order, there is no "reasonable probability" that the Fifth Circuit "would reject" its own thorough decision based on a non-precedential, 2-2 ruling by one of Louisiana's five circuit courts of appeal. This is particularly true here where the Fifth Circuit denied Petitioner's request to stay the mandate pending decisions by the Louisiana appellate courts in *Sher*.

CONCLUSION

The petition for a writ of certiorari should be denied.

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